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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON, APPELLANT,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED MARCH 4, 1946.

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[fol. 1] IN SUPREME COURT OF NEW JERSEY

WRIT OF CERTIORARI—Filed August 19, 1943

New Jersey, to wit: The State of New Jersey, to the Board of Education of the Township of Ewing, in the County of Mercer—Greeting:

We being willing, for certain reasons, to be certified of a certain action of the Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the nineteenth day of August, 1943, all the proceedings, records, and papers dealing with said action of said Board of Education, together with all things touching and concerning the same, as fully and completely as they remain before you, together with this, our writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Thomas J. Brogan, Chief Justice of our Supreme Court, at Trenton, this 5th day of August, 1943.

James J. Gavin, Clerk.

Powell & Parker, Attorneys for Prosecutor.

[fol. 2] ALLOCATUR

The within writ is allowed. Let it be sealed. Either side may take depositions on two days' notice to the other.

Charles W. Parker, Justice of the Supreme Court.

July 31, 1943.

ACKNOWLEDGMENT OF SERVICE

Service of the within writ and allocatur is hereby acknowledged, this thirteenth day of August, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 2a] (Endorsement on Writ:) New Jersey Supreme Court. Arch R. Everson, Prosecutor, vs. The Board of Education of the Township of Ewing, in the County of Mercer and State of New Jersey; Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James F. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan, Respondents. On Certiorari. Writ of Certiorari Allocatur. Powell & Parker, 117 Main Street, Mt. Holly, N. J., Attorneys for Prosecutor.

[fol. 3] IN SUPREME COURT OF NEW JERSEY

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, et al., Respondents

NOTICE TO TAKE DEPOSITIONS—Filed August 20, 1943

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that the prosecutor in the above entitled cause will pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey, at ten o'clock in the forenoon, on Monday, August 23, 1943.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 4] ACKNOWLEDGMENT OF SERVICE

Service of the within notice is hereby acknowledged, this 13th day of August, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF SERVICE—Filed August 20, 1943

STATE OF NEW JERSEY,
County of Mercer, ss:

John W. Kira, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am a Deputy Sheriff of the County of Mercer in the State of New Jersey.

[fol. 5] 2. On Thursday, August 12, 1943, I personally served Florence S. Higgs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

3. On the same day, I personally served Julia Hoy (whose correct name is Grace Hoy) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 1582 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

4. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her father, Walter Paradowski, at her home, 1830 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

5. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with a true copy of

writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 6 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

6. On the same day, I personally served Julia Lydon, with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Brookfield and N. Olden Avenues, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 6] 7. On August 11, 1943, I personally served Frances Smith with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 345 Beechwood Avenue, Ewing Township, R. D., Trenton, New Jersey, and explaining the contents thereof to her.

8. On the same day, I personally served Anna Williams with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

9. On the same day, I personally served Anna Kelly with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her sister, Mrs. Huley at their home, Lower Ferry Road and Stuyvesant Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

10. On August 12, 1943, I personally served Ruth O'Brien with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Ewing Township Hall, R. D. Trenton, New Jersey and explaining the contents thereof to her.

11. On August 11, 1943, I served Paul H. Barr with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to his wife, at his home on Carlton Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 7] 12. On the same day, I served Mary Harter (whose correct name is Helen Harter) with a true copy

of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her husband, at her home 26 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

13. On the same day, I personally served James F. Hughes with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to him at 54 Harrop Place, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

14. On August 12, 1943, I personally served Mary E. Ryan with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

15. On August 12, 1943, I personally served Catherine Wieger with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Allison Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

16. On August 11, 1943, I personally served Bertha Brodowski with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 430 Greenway Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 8] 17. On August 12, 1943, I served John P. Sweeney with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home on Sutherland Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

18. On August 11, 1943, I served August F. Jacobs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 30 Iowana Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

19. On the same day, I served James H. Williams with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 314 Beechwood Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

20. On August 16, 1943, I personally served Sarah Hills with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 22 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

21. On August 12, 1943, I personally served Victoria Domanski with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 440 Weber Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

[fol. 9] 22. On the same day, I served Robert J. Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 1816 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

23. On the same day, I personally served William Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to him at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

Annexed hereto, made a part hereof and filed herewith is a true copy of the notice to take depositions referred to hereinabove.

John W. Kira.

Sworn to and subscribed before me this twentieth day of August, 1943.

Lena M. Booz, Notary Public, N. J.

[fol. 10] NOTICE ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Ana Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

PLEAE TAKE NOTICE, that the prosecutor in the above entitled cause will, pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey; at ten o'clock in the forenoon, on Monday, August 23, 1943.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 11] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

RETURN TO WRIT—Filed August 19, 1943

To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, in obedience to the command of the writ hereto annexed, directed to the said The Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify and send to you, the said Justices, the proceedings, records, and papers dealing with the certain action of said Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a

cost of $859.80, for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainedr thereof.

[fol. 12] In witness whereof, I have hereunto set my hand the seal of the said The Board of Education of the Township of Ewing, in the County of Mercer, this 19th day of August, 1943.

C. G. Latham, District Clerk.

SCHEDULE

I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify that at a regular meeting of The Board of Education of the Township of Ewing, in the County of Mercer, on September 21, 1942, the following action was taken in accordance with the minutes of said meeting:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

C. G. Latham, District Clerk.

[fol. 13] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

REASONS, RELIED UPON BY PROSECUTOR—Filed August 20, 1943

Arch R. Everson, the Prosecutor in the above entitled matter, relies upon the following reasons in his application to have set aside and for nothing holden the action of the Board of Education of the Township of Ewing, in agreeing to pay the costs of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Praochial School, St. Francis School, and Trenton Catholic Boys High School at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof;

I. Said action of said Board of Education, which was taken pursuant to authority purported to be given by vir-

tue of the provisions of 18:14-8 of the Revised Statutes of New Jersey, as amended by Chapter 191 of the Laws of 1941, is illegal and void and said action and said Chapter 191 of the Laws of 1941 invade the constitutional rights [fol. 14] of prosecutor as a taxpayer within the taxing district of the Township of Ewing, and all other taxpayers similarly situated, and said statute is wholly void and unconstitutional for the following reasons:

(a) Said statute violates the provisions of Article 1, Paragraph 3, of the Constitution of New Jersey, in that it permits the raising of money by taxation for the maintenance of a religious ministry.

(b) Said statute violates Article 1, Paragraph 4, of the Constitution of New Jersey, in that is would permit the establishment of one religious sect in preference to another.

(c) Said statute violates the principle of complete separation of church and state enunciated in Article 1, Paragraph 3, and Article 1. Paragraph 4, of the Constitution of New Jersey, in that it purports to authorize the use of public moneys to pay the costs of transportation to private sectarian schools.

(d) Said statute violates Article 1, Paragraph 19, of the Constitution of New Jersey, in that it purports to authorize a gift of public moneys to or in aid of individuals, associations, or corporations.

(e) Said statute violates Article 1, Paragraph 20, of the Constitution of New Jersey, in that it purports to authorize an appropriation of public money to or for the use of societies, associations, or corporations.

(f) Said statute violates Article 4, Section 7, Paragraph 6, of the Constitution of New Jersey, in that it purports to authorize the use of public school funds of the State and [fol. 15] the local school districts for a purpose other than the maintenance and support of public free schools.

(g) Said statute violates the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. Said action of said Board of Education and said statute are in divers other respects illegal and unconstitutional and should be set aside and for nothing holden.

Powell & Parker, Attorneys for Prosecutor.

[fol. 16] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

Depositions

Depositions taken before William N. Cooper, Esq., Supreme Court Commissioner, on the 23d day of August, 1943, at the hour of ten o'clock in the forenoon; said depositions having started at his office, 503 First Mechanics National Bank Building, Trenton, N. J., and because of the number of people appearing was adjourned to the Assembly Room on the fifth floor of said First Mechanics Bank Building.

Depositions were taken in pursuance of notice given.

[fol. 17] APPEARANCES:

Powell & Parker, Esqs., by Albert McKay, Esq., for Prosecutor.

William Abbots, Esq., for Board of Education of the Township of Ewing.

I, Marion H. Sweetman, hereby certify that the attached transcript is a true and accurate copy of my stenographic notes taken before William N. Cooper, Esq., a Supreme Court Commissioner of the State of New Jersey, at his office 503 First Mechanics Bank Building, Trenton, N. J., on August 23, 1943.

Marion H. Sweetman.

It is stipulated that signatures to the depositions are waived, and that the said depositions shall be certified to by the stenographer.

(Marion H. Sweetman, C. S. R., was duly sworn as the stenographer,)

COLLOQUY

The Commissioner: Will you, please, answer to your names and tell us whether or not you are represented by any counsel?

Are there any attorneys here representing anyone?

If the name is not absolutely correct, please let me know whether the name is correct or incorrect.

Florence S. Higgs; not present and not represented by counsel.

Julia Hoy (correct name Grace Hoy); not present and not represented by counsel.

[fol. 18] Anna Kendall (correct name Grace Kendall); not present and not represented by counsel.

Anna Kopezynski (correct name Josephine Kopezynski); not present and not represented by counsel.

Julia Lydon; not present and not represented by counsel.

France Smith (correct name Frances Smith); not present and not represented by counsel.

Anna Williams; not present and not represented by counsel.

Anna Kelly; not present and not represented by counsel.

Ruth O'Brien, appearing personally.

Paul H. Barr, appearing personally.

Mary Harter (correct name Helen Harter), appearing personally.

James F. Hughes (correct name James T. Hughes), appearing personally.

Mary E. Ryan; not present and not represented by counsel.

Catherine Wieger, appearing personally.

Bertha Brodowski, not present and not represented by counsel; her husband.

Edmund F. Brodowski, appearing personaly.

John P. Sweeney, not present and not represented by counsel.

August F. Jacob (correct name August Jacob) appearing personally.

James H. Williams, not present and not represented by counsel.

Sarah Hills; not present and not represented by counsel.

Victoria Domanski; not present and not represented by counsel.

Robert J. Ryan; not present and not represented by counsel.

[fol. 19] William Ryan; not present and not represented by counsel.

Those of you who have appeared are parties defendant in this action. You are not represented by counsel, and I will give you the opportunity to ask any questions that you want to put on the record.

A stipulation has been made by counsel present that the testimony will be taken, the signature of the witness is waived, and the certificate of the stenographer will be issued.

Are you all satisfied that that be done?

ARCH R. EVERSON, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. What is your address, Mr. Everson?
A. 508 Maple Avenue, Ewing Township.
Q. That is Mercer County?
A. That is right.
Q. Do you own your home at that address?
A. I do.
Q. And you pay taxes on that property to the Township of Ewing?
A. That is right.

Mr. McKay: That is all.
Mr. Abbotts: No questions.
The Commissioner: Is there anyone present who desires to ask this gentleman any questions on anything that he has testified to?

(No response.)

Mr. McKay: Mr. Commissioner, there was one question I should have asked Mr. Everson that I did not. I wonder if counsel has any objection.
Mr. Abbotts: No.

[fol. 20] Q. Mr. Everson, are you the prosecutor in this proceeding?
A. Yes.

Mr. McKay: That is all.

CHARLES GARFIELD LATHAM, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. Mr. Latham, are you connected with the Board of Education of the Township of Ewing, in the County of Mercer?
A. I am.
Q. What is your position?
A. District Clerk.

Q. Will you please, refer to the minutes of the meeting of the Board of Education of the Township of Ewing held on September 21, 1942?

A. Yes.

Q. Do you find there a resolution authorizing payment of the cost of transportation of certain pupils from the Township of Ewing to certain private schools in the City of Trenton?

A. Do you mean by private schools, parochial schools?

Q. Yes.

A. Yes, I find it here.

Q. Will you read that resolution, please?

A. (Reading:) "The transportation committee recommended the transportation of pupils of Ewi g to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted."

Q. Mr. Latham, after the adoption of this resolution, were certain applications received from parents of children who desired to send their children from the Township to certain parochial schools in the City of Trenton?

[fol. 21] A. Yes. I say yes to that. The applications were made, and they were carried on renewal each year.

Q. Didn't certain pupils thereafter from the Township of Ewing attend certain parochial schools in the City of Trenton?

A. They did.

Q. Do you have a record of any payments made to parents to reimburse them for the cost of transportation of pupils from the Township of Ewing to parochial schools in the City of Trenton?

A. I do.

Q. When were those payments made?

A. They were made the first five months and second five months' period. They are made about February, after January's attendance comes in. It is somewhere around the middle of February, or the 15th, when they go out.

Q. Will you, please, refer to your records and tell me whether you have a record of pupils from the Township of Ewing attending St. Hedwig's parochial school in the City of Trenton?

A. I do.

Q. Will you, please, give us a list of the payments made for transportation of such pupils from Ewing Township

to that school, giving the name of the parent, the name of the pupil, and the amount?

A. Victoria Domanski, daughter, Dorothy, $19.36; Victoria Domanski, Arthur, $19.36; Victoria Domanski, Robert, $19.36.

Q. Those payments were made, were they not, to reimburse Victoria Domanski for the cost of transportation of her three children from the Township to St. Hedwig's parochial school in the City of Trenton?

A. Right.

Q. Will you refer to your records, please, and tell me whether you have a record of certain payments made to parents for transportation of their children from the Township to St. Francis parochial school in the City of Trenton?

A. I have.

[fol. 22] Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid?

A. Yes. This name since that has been changed here because the name was Mrs. Karl Harter.

Q. Give it.

A. Mrs. Karl Harter, Frances, daughter, $17.80. Mrs. Karl Harter, Karl, $17.80.

Q. Those payments were made, were they not, to reimburse Mrs. Karl Harter for cost of transportation for her children from the Township of Ewing to St. Francis parochial school in the City of Trenton?

A. That is right.

Q. Will you, please, refer to your records again and tell me whether you have a record of payments made to parents to reimburse them for cost of transportation of their children from the Township to the Catholic Boys' High School in the City of Trenton?

A. Yes, I have that record.

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid?

A. Mrs. E. R. Kendall, son Robert, $17.60.

Mrs. A. Kopeczynski, Alexander, $16.50.

Frances J. Smith, for Frances, $18.26.

Mrs. James H. Williams, for James, $9.90.

Q. Will you, please, refer to your records again and tell us whether you find a record of payments having been made

to certain parents to reimburse them for costs of transportation of their children from the Township of Ewing to St. Mary's Cathedral High School in the City of Trenton?

A. I have it.

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the [fol. 23] pupil, and the amount that was paid?

A. Bertha K. Brodowski, for daughter Irene, $15.80.
James T. Hughes, for Alice, $18.20.
Mrs. Karl Harter, for Helene, $18.60.
Mrs. Karl Harter, for Hildegarde, $18.60.
August Jacob, for Margaret, $18.40.
Anna Kelly, for Barbara, $17.80.
Ruth O'Brien, for Joanne, $17.20.
William J. Ryan, for Mary, $18.00.
Mrs. James H. Williams, for Ann, $9.20.
Catharine Wieger, for Marie, $18.60.
John P. Sweeney, for Eileen Hogan, $5.20.
Paul H. Barr, for Lillye, $18.60.
Robert Ryan, for Kathleen, $17.60.

Q. Mr. Latham, those payments that you just read were made to parents covering transportation for the first half of the school year, commencing September, 1942, were they not?

A. That is right.

Q. Have any payments been made to parents of children attending parochial schools for transportation covering the last half of the school year commencing September, 1942?

A. No.

Q. Have certain pupils from the Township of Ewing been attending Catholic parochial schools in the City of Trenton during the last half of that year?

A. Yes.

Q. Why haven't they been reimbursed?

A. On advice of counsel not to pay the second half.

Q. That advice of counsel was given to the Board of Education after this proceeding was instituted, wasn't it?

A. Yes, that is right.

Q. Do you have a record of the pupils from Ewing Township who have been attending parochial schools in the City of Trenton during the last half of the school year, 1942?

A. Yes.

Q. Will you refer to your records, please, and tell me the names of the parents of such children, the name of the

[fol. 24] pupil, and your record of the attendance at St. Hedwig's parochial school for the last half of the school year commencing September, 1942?

A. Victoria Domanski, parent, for Dorothy Domanski; I have a record of attendance for February, March and April, and none for May, and June.

Q. When you say "none for May or June," does that mean that you have not received a report from the school as to attendance?

A. That is right.

Q. Will you, please, proceed with the list of the names of pupils attending the school for the last half of the school year ending June 30, 1943?

A. Victoria Domanski, for Arthur, attendance for February, March, and April, and none for May and June.

Q. When you say "none for May and June," do you mean that you have not received the record from the school?

A. That is right.

Q. Will you proceed with the list, please?

A. Victoria Domanski, for Robert, attendance for February, March, and April, No report on May and June.

Q. Will you, please, refer to your records and give me a list of the pupils attending St. Francis parochial school from the Township of Ewing during the last half of the school year ending June 30, 1943, giving the name of the parent, the pupil, and your record of the attendance?

A. Mrs. Karl Harter, for Francis, a record of February, March, April, May, and June. Mrs. Karl Harter, for Karl, record complete, February, March, April, May, and June.

Q. Do you have a record of certain pupils from the Township of Ewing attending the Catholic Boys' high school [fol. 25] in the City of Trenton during the last half of the school year ending June 30, 1943?

A. Yes, I do.

Q. Will you, please, give us a list of those pupils, giving the name of the parent, the name of the pupil, and your record of the attendance at the school?

A. Mrs. E. R. Kendall, for Robert, report for February, March, April, and May. No report on June.

Mrs. A. Kopszynski, for Alexander, report for February, March, April, and May. None for June.

Q. When you say "none for June," you mean that you have not received a report from the school?

A. No report.

Mrs. Frances J. Smith, for Frances, report for February, March, April, and May, but no attendance report for June.

Mrs. James A. Williams, for James, no report at all, boy having left November 21, 1942.

Q. Will you, please, refer to your records again and give us a list of the pupils from the Township of Ewing who attended St. Mary's Cathedral high school in the City of Trenton during the last half of the school year ending June 30, 1943, giving the name of the parent, the name of the pupil, and your record of attendance at that school.

—. Bertha K. Brodowski, for Irene, attendance report for February, March, April, and May. No report on June.

James T. Hughes, for Alice, report on February, March, April, and May, but no report for June.

Mrs. Karl Harter, for Helene, report for February, March, April, and May. No report on June.

Mrs. Karl Harter, for Hildegarde, report for February, March, April, and May. No report for June.

August Jacob, for Margaret, report for February, March, April, and May. No report on June.

[fol. 26] Mrs. Anna Kelly, report for Barbara, report for February, March, April, and May. No June report.

Mrs. Ruth O'Brien, for Joanna (sic), report for February, March, April, and May. No report for June.

Mrs. Mary E. Ryan, for Mary, report for February, March, April, and May. No report for June.

Mrs. James H. Williams, for James, no report, having moved from Township.

Mrs. Catherine Wieger, for Marie, report for February, March, April, and May. None for June.

John J. Sweeney, for Eileen Hogan, no report, having left school.

Paul H. Barr, for Lillye, report for February, March, April, and May. No report on June.

Robert J. Ryan, for Kathleen, report for February, March, April, and May. No report on June.

Q. Mr. Latham, isn't it a fact that payments would have been made to the parents to reimburse them for costs of transportation during the last half of the school year ending June 30, 1943, if Mr. Abbotts had not advised the Board of Education to withhold payment pending this proceeding?

A. Do you mean it would have been paid?

Q. Yes.

A. Well, I suppose it would. If counsel had not advised against it, it probably would have been paid.

Q. It probably would have been paid if Mr. Abbotts had not advised against it?

A. Yes, Mr. Abbotts, after reading these proceedings, advised against payment while these were going on.

Mr. McKay: That is all.

Cross-examination.

By Mr. Abbotts:

Q. Mr. Latham, the school law provides for the payment [fol. 27] of costs of transportation, provided that the children involved are transported a certain distance. You know of the existence of that law, don't you?

A. Yes.

Q. Was anything done to check up on the distance that it was necessary to be traveled by these children who were going to the parochial schools before they were put in line for payment of that transportation?

A. Yes.

Q. Who checked the distance?

A. I did, the District Clerk.

Q. Did you find that all of the children who were being put in line for payment for their transportation had need to travel the required distance?

A. I did.

Q. You have testified to certain payments being made to the parent involved for the transportation of the children, whose names you have given, to the parochial schools. Were those payments actually made by the Board of Education to the parents involved?

A. Yes.

Q. Were the payments of those sums authorized by the Board of Education?

A. Yes.

Q. Can you refer to your minutes and tell us when they were authorized?

A. The minutes show on Monday, February 15, 1943, the Board authorized the payment of a transportation bill for the first half of high school and elementary at Trenton, to the amount of $8,034.95.

Q. Did that sum of $8,034.95 include the payment to the people whose names you read off and the amounts?

A. Yes, it did.

Q. Was there any transportation of pupils from Ewing Township to schools other than the parochial schools involved?

A. Trenton High Schools, both junior and senior.

Q. The setup in Ewing Township so far as grades are concerned goes how far?

A. The eighth grade.

[fol. 28] Q. And pupils who want to go to school beyond the eighth grade, what do you do with them?

A. They go to the City of Trenton and some to Pennington.

Q. Do you pay the cost of tuition?

A. Yes.

Q. During the school year from beginning July 1, 1942, and ending June 30, 1943, what tuition did you pay for pupils going to schools other than the parochial schools?

A. Do you mean the total sum?

Q. No. The individual amounts?

A. $175 and $195.

Q. What do you pay to the City of Trenton?

A. Junior schools $175 and senior schools $195.

Q. Those pupils that you send to Pennington, how much do you pay for tuition?

A. $128 a year for all grades.

Q. Then in addition to the payment for tuition, did you make any payments for transportation to those pupils who were going to the Trenton Senior High and the Trenton Junior High and the Pennington school?

A. Yes, we made payments to them.

Q. In accordance with the law?

A. That is right.

Q. Do you know how many of the pupils who were transported to the parochial schools were of high school grades?

A. Yes, I can tell by my cards here.

Q. Do you know how many were of elementary grades?

A. Yes.

Q. Will you tell me how many pupils that were transported to the parochial schools were of elementary grade?

A. Five; two to St. Francis and three to St. Hedwig's.

Q. And all of the other pupils who were transported to parochial schools were of high school grade, is that correct?

A. Right.

[fol. 29] Q. Would it have been necessary under the law to have paid the cost of transportation of the pupils of high school grade if they had gone to the public school as furnished by Ewing Township, namely, to the Trenton Junior and Senior high schools?

A. I did not just get that. Do you mean the elementary?

Q. No. Would you have paid the transportation to the Trenton Senior and Junior high schools of those pupils who were going to the parochial high schools if they had not gone to parochial schools but had gone to the facilities which you were furnishing, namely, the Trenton high schools?

A. Yes.

Q. And if they had not gone to parochial schools but had gone to the public schools, which you were furnishing, namely, the Trenton high schools, you would also have paid their tuition, is that correct?

A. That is correct.

Q. As I understand it, you did not pay anything for tuition for these pupils who went to the parochial schools?

A. No.

Q. Just to clear up one point. Your records for attendance at the parochial schools is not complete for the second half of the school year beginning July 1, 1942, and ending June 30, 1943; is that correct?

A. That is right.

Q. I take it that if I had not advised the school board not to make payments you would have had those records complete?

A. I would have gone to the school and got them.

Q. And after having them completed would you have presented the report of the cost to the school board for payments?

A. Yes.

Q. Mr. Latham, how are the children who are transported to Trenton high school, whether senior or junior, transported?

A. By public carrier, bus.

[fol. 30] Q. In other words, they take the public carrier conveyance, is that right?

A. That is right.

Q. How are they reimbursed for that cost of transportation?

A. By report of the high school on their monthly attendance, which I check on the back of these cards, and at the end of five months it is added up and they are paid according to what it costs, 22 cents a day or 20.

Q. You mean that the pupil involved pays his or her own transportation on the public carrier, and is——

A. And reimbursed after five months.

Q. And reimbursed for the number of days of actual attendance as shown by the report coming from the school?

A. That is right.

Q. What is the cost of the transportation per day?

A. It varies according to the schools they go to.

Q. What is the reason for the variance?

A. Some do not have to take a transfer.

Q. And those who do not have to take a transfer, what is the actual cost?

A. Ten cents. 20 cents a day. Ten cents each way. But the Board provides a penny for transfer purposes for those who go to town and have to transfer over to Central high school.

Q. Can you tell us in transporting to what schools is a transfer necessary?

A. Well, you see now you are speaking of all schools. The parochial schools—St. Mary's it is 20 cents; but the Boys Catholic high school is 22 cents because they go in the center of town and must take a transfer on Chambers Street or Chestnut I think it is.

Q. And for that transfer they must pay one cent each way?

A. They are allowed one cent each way.

Q. Is it upon the same basis, namely, a report of days actually attended at the school that you have paid the cost [fol. 31] of transportation to those who have gone to the parochial schools as listed by you?

A. That is right.

Q. The 20 cents a day or 22 cents a day is a round trip?

A. That is a round trip.

Q. In other words, the ordinary 1 zone bus fare in Trenton, and including Ewing Township, is 10 cents?

A. Yes.

Q. And 1 cent for a transfer to another line?

A. That is right.

Mr. Abbotts: That is all.

The Commissioner: Does any person present desire to ask the witness any questions?

Father Endebrock: I would like to make a correction in one of his statements.

The Commissioner: Just a moment. You cannot correct a witness. You can testify, if you wish. You can only ask the witness a question whether or not his answer is correct.

If you wish to do that you may do it. Just ask the witness the question, please.

Father Endebrock: Speaking of the children of Mrs. Williams attending the Catholic Girls high school you said James rather than Ann. It does not make much difference but it would look rather odd to say James attended a girls' high school.

The Witness: There are two Williamses. One goes to the boys' school and that is James.

Father Endebrock: The first time you had it correct and then when you repeated "Mrs. James Williams" you said "James" rather than "Ann."

[fo] 32] The Witness: That is because the card got in the wrong place.

The Commissioner: Suppose you ask the question.

Mr. McKay: I would prefer to ask that question rather than have Father Endebrook ask it as I am not so sure that he has the right to question the witness.

The Commissioner: Do you have any objection to counsel asking the question?

Father Endebrock: No.

By Mr. McKay:

Q. Mr. Latham, when you testified relative to the attendance of pupils at St. Mary's Cathedral high school you testified that James Williams was one of the pupils; is that correct, or should it have been Ann?

A. It should have been Ann.

JOHN JOSEPH ENDEBROCK, being duly sworn, deposes and says as follows:

Direct examination.

By Mr. McKay:

Q. Father Endebrock, are you in any way connected with the Catholic parochial schools in the City of Trenton?

A. Yes, I am.

Q. What is your position, Father?

A. I am Superintendent of the parochial schools throughout the Diocese of Trenton, which includes the City of Trenton.

Q. Are Catholic Boys high school and St. Mary's Cathedral high school, St. Francis school, St. Hedwig's parochial school all Roman Catholic parochial schools in the City of Trenton?

A. They are.

[fol. 33] Q. Father Endebrock, are you familiar with the curricula in those schools?

A. Yes.

Q. Is religion taught as part of the curricula?

A. Yes, it is.

Q. In each one of the schools that I mentioned?

A. Yes.

Mr. McKay: That is all.

Cross-examination.

By Mr. Abbotts:

Q. Father Endebrock, the schools which have been mentioned by counsel, are they conducted in whole or in part for profit?

A. No.

Q. Not at all.

A. The only money taken in is what is paid by the parents, or the parish for the maintenance of the school, but they all operate at a loss.

Mr. Abbotts: That is all.

The Commissioner: Does anyone have any questions that they desire to ask Father Endebrock?

(No response.)

Mr. McKay: I was wondering if any of the defendants had come in since the hearing started.

The Commissioner: Has anyone come in since I read out the names?

(No response.)

The Commissioner: Has anyone here been made a party defendant by order of the court?

This testimony has been taken in pursuance of a notice given. I do not know whether I should give you the opportunity of offering any testimony you have, but if counsel [fol. 34] have no objection if anybody has any testimony that you want to offer, unless counsel do object I will give you an opportunity of doing so.

Mr. McKay: I have no objection, and I think that any defendant here is entitled to put in his or her testimony.

The Commissioner: I think so. Do any of the ladies or gentlemen have any testimony to give which you think has not been covered?

Of course, you understand this is only a preliminary hearing to take testimony to go before the Court. Certain facts have to be presented before the Court and if those facts are as you believe them and you have no contradictory testimony I presume you have nothing to offer.

Make a note I made the offer and no one desires to present any testimony.

Mr. McKay: There is only one thing further I have in mind. I would like to talk with Mr. Abbotts a moment if I may.

(Conference between counsel.)

Mr. McKay: I think that is all, Mr. Commissioner.

The Commissioner: The taking of the testimony is now adjourned.

[fol. 35] CERTIFICATE OF SUPREME COURT COMMISSIONER

STATE OF NEW JERSEY,
County of Mercer, ss.:

I, William N. Cooper, Supreme Court Commissioner, do hereby certify that the foregoing depositions were taken before me on the twenty-third day of August, 1943, at the hour of ten o'clock in the forenoon, in pursuance of the cer-

tificate of Marion H. Sweetman hereto attached; that the witnesses were duly sworn to testify to the truth, the whole truth, and nothing but the truth, and did depose to the matters contained in the foregoing depositions; that the said testimony was taken stenographically by the said Marion H. Sweetman in my presence.

William N. Cooper, Supreme Court Commissioner.

[fol. 36] In Supreme Court of New Jersey

[Title omitted]

Notice of Application to Amend Writ—Filed September 20, 1943

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that on Tuesday, October 5, 1943, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House, Annex, in the City of Trenton, [fol. 37] New Jersey, for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

ACKNOWLEDGMENT OF SERVICE

Service of the within notice is hereby acknowledged this third day of September, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 38] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF ARGUMENT—Filed September 20, 1943

To William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Francis Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the [fol. 39] State House Annex, in the City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard by said Court.

Powell & Parker, Attorneys for Prosecutor.

Dated: September 3, 1943.

ACKNOWLEDGMENT OF SERVICE

Service of the within notice of argument is hereby acknowledged this third day of September, 1943.

William Abbotts, Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

[fol. 40] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF JOHN W. KIRA—Filed September 20, 1943

STATE OF NEW JERSEY,
County of Mercer, ss.:

John K. (*sic*) Kira, of full age, being first duly sworn according to law, upon his oath deposes and says:

1. That on Tuesday, September 7, 1943, I personally served Florence S. Higgs with true copies of notice of argument and notice of application to amend writ of certiorari in the above entitled matter, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

2. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 6 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

[fol. 41] 3. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her father, Walter Pardowski, at her usual place of abode, 1830 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

4. On the same day, I served Julia Lydon with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her husband, Michael Lydon, at her usual place of abode, 172 Brookland Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

5. On the same day, I personally served Frances Smith with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 345 Beechwood Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

6. On the same day, I personally served Anna Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

7. On the same day, I served Anna Kelly with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her sister, Mary Entwistle, at the usual place of abode of said Anna Kelly, Lower Ferry Road, Ewing Township, Mercer [fol. 42] County, New Jersey, and explaining the contents thereof to said Mary Entwistle.

8. On the same day, I personally served Ruth O'Brien with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at the Ewing Township Hall, Pennington Road and Green Lane, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

9. On Wednesday, September 8, 1943, I personally served Paul H. Barr with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at Carlton Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

10. On Tuesday, September 7, 1943, I personally served Mary Harter (whose correct name is Helen Harter) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 26 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

11. On the same day, I served James F. Hughes (whose correct name is James T. Hughes) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Alice Hughes, at his usual place of abode, 54 Harrop Place, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

12. On the same day, I served Mary E. Ryan with true copies of said notice of argument and notice of application [fol. 43] to amend writ of certiorari, by handing same to her husband, William Ryan, at her usual place of abode, 16 Rut-

ledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

13. On the same day, I personally served Catherine Wieger with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at Allison Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

14. On the same day, I personally served Bertha Brodowski with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 430 Greenway Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

15. On the same day, I served John P. Sweeney with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, at his usual place of abode, Sutherland Road, Ewing Township, Mercer County, New Jersey, and explaining the content thereof to her.

16. On the same day, I served August F. Jacobs (whose correct name is Augu Jacob) with true copies of said notice of argument an notice of application to amend writ of certiorari, by handing same to his wife, Maria Jacob, at his usual place of abode, 30 Iowana Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

[fol. 44] 17. On the same day, I served James H. Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Anna Williams, at his usual place of abode, 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

18. On the same day, I personally served Sarah Hills with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 22 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

19. On the same day, I personally served Victoria Domanski with true copies of said notice of argument and

notice of application to amend writ of certiorari, by handing same to her at 440 Weber Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

20. On the same day, I served Robert J. Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Emily Ryan, at his usual place of abode, 1816 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

21. On the same day, I personally served William Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at 16 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

[fol. 45] Annexed hereto and made a part hereof are true copies of the notice of argument and notice of application to amend writ of certiorari referred to herein.

John W. Kira.

Sworn to and subscribed before me this 10th day of September, 1943. Lena M. Booz, Notary Public of New Jersey.

[fol. 46] NOTICE OF ARGUMENT ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the State House Annex, in the City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the fore-
[fol. 47] noon, or as soon thereafter as the same can be heard by said Court.

Powell & Parker, Attorneys for Prosecutor.

Dated: September 3, 1943.

NOTICE ANNEXED TO FOREGOING AFFIDAVIT

[Title omitted]

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

Please take notice, that on Tuesday, October 5, 1943, at [fol. 48] 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House Annex, in the City of Trenton, New Jersey, for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfully yours, Powell & Parker, Attorneys for Prosecutor.

[fol. 49] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

ORDER AMENDING WRIT OF CERTIORARI—Filed October 6, 1943

This matter being opened to the court by Powell & Parker, Attorneys for the Prosecutor, and it appearing that notice has been duly served upon all the respondents herein of an application to this court for an order amending the writ of certiorari filed herein by striking out the names of the respondents, Julia Hoy, Anna Kendall, Anna

Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs and substituting their correct names in place thereof; and it further appearing to the satisfaction of the court that the correct names of said respondents are Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively, and that they have been duly served with true copies of said writ of certiorari; and William Abbotts, Esq., Attorney for the Respondent, Board of Education of the Township of Ewing, having consented to the entry of this order; and no reason appearing to the contrary:

[fol. 50] It is, on this fifth day of October, 1943, ordered that the writ of certiorari in the above entitled matter be and hereby is amended by striking out the names of the Respondents, Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively. Let this rule be entered.

Charles W. Parker, Justice of the New Jersey Supreme Court.

Entered on Motion of: (Signed) Powell & Parker, Powell & Parker, Attorneys for Prosecutor.

I hereby consent to the entry of the within order amending writ of certiorari.

(Signed) William Abbotts, William Abbotts, Attorney for the Respondent, Board of Education of the Township of Ewing.

[fol. 51] IN SUPREME COURT OF NEW JERSEY, OCTOBER TERM, 1943

No. 233

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, et al., Respondents

On Certiorari. Before Justices Parker, Heher and Perskie. Submited October 5, 1943. Decided September 13, 1944

Resolution of township board of education, appropriating money, part of school fund, for transportation of pupils to and from schools in a neighboring city other than public schools, held unconstitutional and invalid.

For the prosecutor, Harold T. Parker (Joseph Beck Tyler, amicus curiae).

For the respondents, John Solan and William Abbotts.

OPINION OF JUSTICES PARKER AND PERSKIE—Filed September 13, 1944

The opinion of the Court was delivered by

PARKER, J.:

The question raised by this writ, and submitted on briefs without oral argument, is as to the legal validity of a resolution adopted by the Board of Education of the Township of Ewing, adjoining the City of Trenton, relating to the transportation to Trenton and return, of school children. It appears that the public school facilities in the township [fol. 52] do not extend beyond the eighth grade, and that pupils past that grade have customarily attended public schools in Trenton or Pennington, the township paying for the tuition, and also the cost of transportation advanced by parents or other relatives. Previous to July 1, 1941, all children so transported attended public high schools, and the township Board contracted for their transportation pursuant to R. S. 18:14-8, the first paragraph of which provided that "whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the trans-

portation of such children to and from school." The original act seems to date from 1903; (acts of second special session, p. 45). But in 1941 (P. L. p. 581) the paragraph above quoted was amended and another paragraph added. In the first paragraph the words "the schoolhouse" are changed to read "any schoolhouse" and after the words "to and from school" the paragraph continues "including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part." The additional paragraph reads: "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

The result, of course, is to provide for free transportation of children at the expense of the home municipality and of [fol. 53] the State school fund to and from any school, other than a public school, which is not operated for profit; and accordingly, the resolution brought up by this writ provides for the transportation of school children of Ewing township, not only to the Trenton and Pennington High Schools, but to certain other designated schools in Trenton not operated for profit, but not connected with the public school system, "by way of public carriers as in recent years." It is stipulated that the township authorities pursuant to the resolution agreed to pay for the then current school year the cost of transportation to such non-public schools approximately $859.80 and actually did pay part thereof.

We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution, which reads: "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools,

for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever. * * *"

The facts are not in dispute. We are called upon to decide the purely legal question whether or not the township board of education in appropriating money for transporta-
[fol. 54] tion of pupils to and from parochial schools in a neighboring city, *i. e.*, other than public schools, contravened paragraph 6 quoted above.

There are two theories. A majority of the State courts have held such transportation unconstitutional. The leading case, suporting that theory, is the New York case of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789. Typically illustrative of this theory are the following cases: *State ex rel. Traub* v. *Brown* (Delaware) 36 Del. 181, 172 A. 835; *Sherrard* v. *Jefferson County Board of Education* (Kentucky), 294 Ky. 469, 171 S. W. (2d) 968; *Gurney* v. *Ferguson* (Oklahoma), 190 Okl. 254, 122 P. (2d) 1002; *Mitchell* v. *Consolidated School District No. 201* (Washington), 135 P. (2d) 79 and *State ex rel. Van Straten* v. *Milquet* (Wisconsin), 180 Wis. 109, 192 N. W. 392.

The other theory (Child Benefit Theory) that such transportation is not unconstitutional was adopted by the court of Maryland (*Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199A. 628); by Louisiana (*Borden* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 665, 67 A. L. R. 1183 and *Cochran* v. *Louisiana State Board of Education*, 168 La. 1030, 123 So. 664); and by Mississippi (*Chance* v. *Mississippi*, 206 So. 706).

We are not required to make a choice between these two theories, as the matter is not one of first impression in this State. In the case of *Rutgers College* v. *Morgan*, 70 N. J. Law, 460, at pages 474-475, it was held by this court, in an opinion by Justice Van Syckel, that the constitutional provision (paragraph 20 of Article I) and the provision relating to special laws "does not bar instrumentalities for pub-
[fol. 55] lic education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative

power to furnish facilities by general laws for public education under its own supervision." The decision was affirmed by the Court of Errors and Appeals in all essential features in 71 Id. 663. The same principle was applied by Vice-Chancellor Buchanan *in re Voorhees*, 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d. 650.

The resolution under review will be set aside, with costs.

[fol. 56] In Supreme Court of New Jersey, October Term, 1943

No. 233

Arch R. Everson, Prosecutor,

vs.

The Board of Education of the Township of Ewing, in the County of Mercer, et al., Defendants

Dissenting Opinion of Justice Heher—Filed September 13, 1944

Heher, J. (Dissenting):

I dissent, and vote to dismiss the writ of certiorari.

The statute provides for the transportation of children attending schools other than public schools, not operated for profit, on routes established for the conveyance of public school children. Pamph. L. 1941, p. 581; N. J. S. A. 18:14-8.

It is assailed, first as in contravention of paragraphs 19 and 20 of Article I of the State Constitution. Paragraph 19 provides that "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation;" and paragraph 20 directs that "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

[fol. 57] Paragraph 19 is not in terms applicable to school districts. And I cannot accept the view that the mere transportation of pupils to private schools, over a route already

established for the conveyance of public school children, constitutes a gift, donation, or appropriation of money by the State or a municipal corporation "for the use" of a "society, association or corporation."

Of course, a gift of public funds or property to a private society, association, or corporation would be unconstitutional whether made directly or indirectly. *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, affirmed 135 N. J. Eq. 244. But this is not the case here. Such transportation is a service to the children and their parents rather than to the schools, for otherwise the parents would be obliged to provide the conveyance or incur the traffic hazards incident to the journey, for which children are generally so ill-equipped It is in no real sense a contribution to "the use" or the maintenance of the institutions which the children attend. Here, the school district did not operate the transport. The challenged resolution provides for conveyance "by way of public carriers;" and the parents were reimbursed directly for the fares thus expended. And such provision is in the exercise of what I deem to be an unquestionable public function.

School attendance is compulsory. *R. S. 18:14-14, et seq.* Compulsory education is a prerogative of the state. The state may compel parents to perform the natural duty of education owed to their children, and aid them in so doing, except as restrained by constitutional limitations. But compulsory attendance at a public school, whether the compulsion be direct or indirect, would violate constitutional guaranties. *Pierce* v. *Society of Sisters of the Holy Names* [fol. 58] *of Jesus and Mary*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. The statute under review facilitates the attendance at both clasess of schools of children remotely situated, and thus contributes substantially to the effectuation of the statutory provisions for compulsory education, and at the same time considers the factor of safety—a reasonable measure to those ends. I am unable to perceive any intrusion upon these or any other constitutional limitations by the mere provision, under such conditions, of transportation to children attending non-public schools not operated for profit. The State recognizes the private school, as perforce it must, as a means of providing the minimum of education decreed by what is conceived to be sound public policy; and I think the Legislature possesses the incidental right of providing transportation to such schools of children resid-

ing at a distance, especially where it is confined to routes found necessary for the conveyance of public school children. I cannot find in any of our constitutional prohibitions a purpose to deny such transportation to children of non-profit private schools, seeking the education which satisfies the standard of the compulsory education law. If this transportation provision be viewed apart from the institutions themselves, and considered as an aid to parents in making educational facilities of their choice available to their children with a measure of safety, in the service of an essential public interest, it seems to me that constitutional doubts lose their force. As so viewed, the act is in aid of compulsory education, a primary concern of society. Education is a matter of "supreme importance, which should be diligently promoted." *Meyer* v. *Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042.

[fol. 59] A like statute has recently received the approval of the Court of Appeals of Maryland. *Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199 Atl. 628. It was there held that "the accommodation of private school children is an incidental use of provision made for an unquestioned public purpose," and therefore the statute did not infringe the prohibition of the Declaration of Rights "against the use of funds for private purposes." Chief Judge Bond declared that whether such use is "private * * * appears to be, finally, a question whether it is in furtherance of a public function in seeing that all children attend some school, and in doing so have protection from traffic hazards." He continued: "Starting with the interest which the State is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function. * * * This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration Rights. The institution

must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

There is a conflict in the cases elsewhere that is in some [fol. 60] instances more seeming than real. For example, in the case of *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576, cited in the majority opinion, the constitution contained a sweeping provision against the use, "directly or indirectly," by the State or any subdivision thereof, of public money "in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious, or in which any denominational tenet or doctrine is taught." The majority classified the statute as bestowing an indirect benefit upon the institutions as such, on the theory that "Free transportation of pupils induces attendance at the school," and "The purpose of transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it." Chief Judge Crane, for the minority, considered the measure to be a proper complement to the compulsory education statute. He said: "The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves. Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. * * * There is no benefit to the schools except, perhaps, as one may conceive an accidental benefit in the sense that some parents might place their children in religious schools when they anticipate transportation provision, though they might hesitate to do so if the children were compelled [fol. 61] to make their own way. The constitutional provision is not designed to discourage or thwart the school where religious instruction is imparted. 'Denominational religion is merely put in its proper place outside of public aid or support.'"

The doctrine that provision of transportation aids the private non-profit school by inducing attendance of pupils was rejected, as unfounded in fact, by Mr. Justice Robinson and Mr. Justice Mallery in interesting and well rea-

soned dissents in the case of *Mitchell* v. *Consolidated School District No. 201*, 135 Pac. (2d) 79. It would seem that the statutory provision for the transportation of public school pupils was primarily designed to make such educational facilities available to pupils remotely situated from the seat of instruction, and thus to aid in the performance of the public educational function.

These considerations also dispose of the contention that the statute runs counter to paragraphs 3 and 4 of Article I of the State Constitution.

And I cannot agree that the Act violates Article IV, section 7, paragraph 6, of the Constitution, safeguarding the "fund for the support of free schools."

The attack is upon the statute itself, not the use of public moneys as in contravention of this constitutional provision. The sole point made is that the act infringes the several cited constitutional limitations; and it is said *arguendo*, that "part of the moneys used by school districts for transportation of pupils to private or sectarian schools can be traced to the school districts directly from the State school fund mentioned in the Constitution." There is no proof whatever that any part of the State school fund was so [fol. 62] used here. The holding of the case of *Rutgers College* v. *Morgan*, 70 N. J. L. 460, affirmed 71 N. J. L. 663, is that this constitutional mandate has relation only to what may be done with the constituted school fund, not what may be done with the general funds of the State. The sole question raised here is the constitutional sufficiency of the statute.

IN SUPREME COURT OF NEW JERSEY

ARCH R. EVERSON, Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, et al., Respondents

On Certiorari

RULE SETTING ASIDE RESOLUTION OF THE RESPONDENT BOARD OF EDUCATION—Filed September 14, 1944

The Court, having inspected the depositions and the transcript and proceedings of the respondent Board of

Education, returned with the writ of certiorari in this cause and the reasons for setting aside the resolution adopted by the respondent Board of Education on September 21, 1942, and having duly considered the argument of counsel herein, it is on this 14th day of September, 1944;

Ordered that the aforesaid resolution of the respondent [fol. 63] Board of Education be set aside, vacated and made for nothing holden, with costs to be taxed.

Entered September 14, 1944, on Motion of: (Signed) Powell & Parker, Attorneys for Prosecutor.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL—Filed November 29, 1944

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor.

SIRS:

Please take notice that the Board of Education of the [fol. 64] Township of Ewing, in the County of Mercer, Florence S. Higgs, Grace Hoy, Grace Kendall, Josephine Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Helen Harter, James T. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August Jacob, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan, and William Ryan, respondents in the above-stated proceeding, appeal from the whole of the judgment entered in this cause, to the Court of Errors and Appeals in the last resort in all causes in New Jersey.

Respectfully yours, William Abbotts, Attorney for Respondents.

William H. Speer, of Counsel.

Dated: November 18, 1944.

Sat below: Parker, J.; Perskie, J.; Heher, J.

Service of the within Notice of Appeal is acknowledged this 18th day of November, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor.

[fol. 65] In New Jersey Court of Errors and Appeals

Board of Education of the Township of Ewing in the County of Mercer, Florence S. Higgs, Grace Hoy, Grace Kendall, Josephine Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Helen Harter, James T. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August Jacob, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan, Respondents-Appellants,

vs.

Arch R. Everson, Prosecutor-Appellee

On Appeal from the New Jersey Supreme Court

Grounds of Appeal—Filed November 29, 1944

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor-Appellee.

Sirs:

Please take notice that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause: [fol. 66] The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours, William Abbotts, Attorney for Respondents-Appellants.

William H. Speer, of Counsel.

Service of the within Grounds of Appeal is acknowledged this 18th day of November, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor-Appellee.

[fol. 67] In New Jersey Court of Errors and Appeals

[Title omitted]

Grounds of Appeal—Filed January 2, 1945

To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor-Appellee.

Sirs:

Please take notice that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause: [fol. 68] The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours William Abbotts, Attorney for Respondents-Appellants.

William H. Speer, of Counsel.

Due and legal service of the within Grounds of Appeal is hereby acknowledged as of November 18, 1944.

Powell & Parker, Attorneys for Arch R. Everson, Prosecutor-Appellee.

[fol. 69] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Amending Title of Grounds of Appeal—Filed January 2, 1945

It appearing to the Court that in the Grounds of Appeal served on November 18, 1944, and filed on November 29, 1944, in this Court, in the above-entitled cause, that in the styling of the title the names of the parties were inadvertently reversed, and it appearing that counsel for the prosecutor-appellee have consented to the making, entry, and filing of this order, and it further appearing that Grounds of Appeal amending and curing said situation, by the transposition of the names of the parties to said appeal so as to bring the same into conformity with Rule 20 of this Court, have been served upon the prosecutor-appellee, and due and

[fol. 70] legal service thereof has been acknowledged thereon as of November 18, 1944:

It is hereby ordered that said Grounds of Appeal actually served on November 18, 1944, and filed in the Office of the Clerk of this Court on November 29, 1944, be and the same hereby are amended so as to conform to Rule 20 of this Court, and are to be considered as having been in the form and substance set forth in the Grounds of Appeal acknowledged to have been served on prosecutor-appellee "as of November 18, 1944," and said Grounds of Appeal actually served on November 18, 1944, are to be considered as having been entitled at the date of their service and filing, and thence hitherto, as if said title had always been as set forth in the Grounds of Appeal acknowledged to have been served upon prosecutor-appellee "as of November 18, 1944."

We hereby consent to the making, entry, and filing of the above order.

Powell & Parker, Attorneys for Prosecutor-Appellee.

[fol. 71] In New Jersey Court of Errors and Appeals, May Term, 1945

No. 32

Arch R. Everson, Prosecutor-Respondent,

vs,

Board of Education of the Township of Ewing, in the County of Mercer, et als., Respondents-Appellants

Appeal from the Supreme Court on Certiorari.

Argued May 21, 1945; decided October 15, 1945.

Syllabus

P. L. 1941, Chapter 191 held to be a valid enactment and not in contravention of Article 1, paragraphs 3, 4, 19 and 20, or Article 4, Section 7, paragraph 6 of the Constitution of this State or the Fourteenth Amendment to the Constitution of the United States.

For respondents-appellants, William H. Speer, of counsel; William Abbotts, attorney of record; George G. Tennant and Joseph Lanigan, amici curiae.

For prosecutor-respondent, Albert McCay, of counsel; Powell and Barker, attorneys of record; Joseph Beck Tyler, attorney and of counsel with American Civil Liberties Union, amicus curiae.

OPINION—Filed Oct. 15, 1945

The Opinion of the Court was delivered by the CHANCELLOR:

This is an appeal from a judgment of the Supreme Court, on certiorari setting aside a resolution of the appellant Board of Education enacted under the authority of R. S. 18:14-8 as amended by P. L. 1941, Chapter 191 providing for the transportation of pupils for the school year, July 1, 1942 to June 30, 1943.

Pursuant to such resolution the appellant on February 15, 1943, authorized the payment of $8,034.95 for transportation. Of this sum $357.74 was paid to the parents of twenty-one pupils who were transported to parochial [fol. 72] schools in Trenton, five to elementary schools and sixteen to high schools. The appellant provides no education facilities in its district beyond the eighth grade. The transportation was by public carrier bus. The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.

The record before us shows that the reasons advanced in the Supreme Court and here in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely; Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State; and, the Fourteenth Amendment to the Constitution of the United States.

None of these several provisions of the Constitution, except that of Article IV, Section 7, paragraph 6, requires any discussion. For neither their language, meaning, intent, nor effect are violated by the statute, supra, or the resolution challenged in this proceeding.

We turn at once to the reason that the statutory enactment is constitutionally defective because it is said that it is in conflict with Article IV, Section 7, paragraph 6.

It appears from the majority opinion of the Supreme Court that it based its conclusion and judgment "on the foundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution" citing as authority Rutgers College vs. Morgan, 70 N. J. L. 460 affd. 71 N. J. L. 663 and In re Voorhees, 123 N. J. Eq. 142 affd. 121 N. J. L. 594 (Supreme Court) affd. here, 124 N. J. L. 35. We find in the minority opinion the statement "There is no proof whatever that any part of the State School Fund was so used here." A meticulous examination of the record shows an absolute lack of any such proof.

The duty of this court in such a situation is well established. It is settled that findings of fact by the Supreme Court on conflicting evidence or on uncontroverted evidence reasonably susceptible of different inferences are conclusive on appeal, Jersey City vs. State Water Policy Commission, 118 N. J. L. 72, 77; Siravo vs. Sirian Lamp Co., 124 N. J. L. 433. It is also settled that we do not hesitate [fol. 73] to reverse where there is no competent evidence to support a fact conclusion arrived at below, Ciocca vs. National Sugar Refining Co., 124 N. J. L. 329, 335; Cirillo vs. United Engineers, etc., 121 Id. 511, 512; Grant vs. Metropolitan Ice Co., 108 Id. 536, 537 and further that this Court will reverse any material fact conclusion if it rests on erroneous premises. Bollinger vs. Wagaraw Building Supply Co., 122 N. J. L. 512, 517; Ciocca vs. National Sugar Refining Co., supra, 335; Rotino vs. J. P. Scanlon, Inc., 126 Id. 419, 421.

As said, the record before us is barren of any evidence as to the source of the funds from which the challenged payment of $357.74 was made.

In this state of proof we must assume that the payment was made lawfully, from funds under appellant's control. We may not assume, in the absence of proof, that the moneys were taken from the appellant Board's distributive share of the income of the State School Fund, R. S. 18:10-1 to 17.

The history of the State School Fund—"The Fund for the support of free schools"—may be traced from its origin in P. L. 1817, pam. 26 as amended by P. L. 1818, pam. 100 and succeeding statutory amendments and supplements. Pennington's Revision (1821) p. 612, 649, 660; Nixons Digest (4th Ed. 1868) p. 877, sec. 65-75; Revision (1877)

p. 1081, sec. 65-76 and p. 1087, sec. 101, 102; 3 Gen. Stat. 3030, sec. 65-76; 4 Comp. Stat. 4778, sec. 166-176; R. S. 18:10-1 to 17. Therein is perceived the basis and reason for the constitutional provision relied on by the Supreme Court which was originally inserted in the basic law in 1844.

This constitutional provision of 1844 stripped the legislature of the power it had reserved to itself in P. L. 1318, pam. 100, to change, alter or dissolve this trust fund. The capital of the fund and the income therefrom were protected against trespass by the legislature. State vs. Rutherford, 98 N. J. L. 465, 467. The constitutional provision together with other statutes identifies the fund therein referred to.

The amendment of this paragraph of the Constitution in 1875 had an entirely different purpose than the provision just discussed. The amendment of 1875 was a mandate to the legislature to broaden the field of free public school education and pursuant to this mandate legislation was enacted to pay the cost of such education by providing for the raising of a state school tax, delegating taxing powers to local school districts to raise funds for local [fol. 74] school purposes and dedicating certain railroad taxes and other state funds for the same purpose. These were all statutory provisions and were subject to alteration, modification, and repeal by subsequent legislation untrammeled by the constitutional inhibition applicable to the fund for the support of free schools. The legislature already had the necessary power and the amendment of 1875 neither increased nor limited it in any particular.

Nothing appears on the face of the resolution or the challenged statute that could be construed to authorize the use by the appellant of any of its apportioned share of the fund for the support of free schools, R. S. 18:10-1 to 17, to pay the cost of transportation of pupils to parochial schools.

We are asked to imply that the statute and resolution authorize the use of constitutionally proscribed funds for such purpose.

This we may not do. The rule is that courts will presume in favor of the constitutionality of a statute and will incline to a construction favoring its validity unless its invalidity plainly appears. State vs. Tachin, 92 N. J. L. 269, 274 affd. 93 Id. 485; State Board of Milk Control vs. New-

ark, 118 N. J. Eq. 504, 519; State vs. Murzda, 116 N. J. L. 219, p. 223.

We are likewise urged to construe R. S. 18:10-41 as indicating an unconstitutional use of money by the appellant. This section requires the county superintendent of schools to apportion the State School moneys allotted to the county to the respective school districts for certain purposes designated therein.

Let it be noted here that all funds included in the phrase "state school moneys" are not within the constitutional inhibition relied on by the respondent. The section, however, requires the County Superintendent to apportion out of State School moneys "Seventy-five per cent of the cost of transportation of pupils to *public school or schools* * * *."

The language is clear and unambiguous.

In the case before us the total transportation cost was $8,034.95 for a half year which included $357.74 as the cost of transporting parochial school pupils and in the absence of proof to the contrary we must assume that the County Superintendent obeyed the statute and based the allotment on the cost of transporting the pupils to the public school or schools.

[fol. 75] School districts, such as the appellant, are authorized by R. S. 18:7-78 to raise by special district taxes funds to defray certain current charges and expenses of the public schools in their districts including "transportation of pupils * * *" and "the incidental expenses of the schools."

Funds so raised are not prescribed or limited in their use by Article IV, Section 7, paragraph 6 of the Constitution.

The intent of P. L. 1941, Chapter 191 is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route*. Payment of such expense out of local taxes is the payment of "incidental expenses" or "transportation of pupils" authorized by R. S. 18:7-78.

Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for

the transportation of pupils to any school, we conclude that such authorization of the use of local funds is likewise authorized by P. L. 1941, Chapter 191, and R. S. 18:7-78. The legislature clearly intended once the transportation of such pupils was contracted for, that it should be paid out of funds constitutionally available for the purpose.

It is next urged the R. S. 18:14-8 as amended by P. L. 1941, Chapter 191, is violative of *Article I*, paragraphs 19 and 20 because the payment of transportation costs of pupils attending schools is the giving of direct or indirect aid to sectarian schools or amounts to a gift to an individual.

Compulsory education has long been a requirement in this State. P. L. 1874, Chapter 522; p. 135; P. L. 1875, Chapter 443, p. 105; P. L. 1885, Chapter 217, p. 280; 3 Gen. Stat. p. 3061, Sec. 255; 4 Comp. Stat. p. 4775, Sec. 153, et seq.; R. S. 18:14-14 as amended P. L. 1940, Chapter 153, p. 346; R. S. 18:14-34, 39, 40.

It is a matter of public concern and legislative regulation and should be enforced as long as the requirements are reasonable. Of course this is subject to constitutional limitations, Pierce vs. Society of Sisters, etc. 268 U. S. [fols. 76-77] 510; 45 S. Ct. 571, 69 L. ed. 1070.

It is a public matter within the legislature prerogative concerning which the legislature may act and has, by the statutes including that here considered.

The Compulsory education statutes impose on the *parents*, not the children, an absolute duty subject to three exceptions, physical or mental disability of the child or adequate provision by private teaching other than in a recognized day school. The statute is penal in nature for a violation of which parents may be convicted as disorderly persons, R. S. 18: 14-34, 39, 40.

Many situations could arise, where, without regular means of transportation, parents would be placed in a situation which made it practically impossible to comply with the compulsory education requirements and therefore without wilful intent to evade or transgress, would become subject to the penalties established for failure to perform the duty imposed.

It was to meet this mischief that the original statute authorizing the transportation of pupils living remote from the schools was enacted. The statutes looking to trans-

portation became complementary to and in aid of the compulsory education statutes.

It is a public matter and moneys expended therefor, except those prohibited by the Constitution of this State, do not constitute the expenditure of public moneys for private purposes.

We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.

The judgment of the Supreme Court is reversed and the cause remanded to the end that the writ of certiorari be dismissed.

[File endorsement omitted.]

[fol. 78] In New Jersey Court of Errors and Appeals, May Term, 1945

No. 32

Arch R. Everson, Prosecutor-Respondent

vs.

Board of Education of the Township of Ewing, in the County of Mercer, et als., Respondents-Appellants

Dissenting Opinion—Filed October 15, 1945

Case, J. (Dissenting):

The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally.

Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. It must be assumed that these various arrangements were within the purview of the statute; else the resolution of the Board of Education was itself without statutory authority and therefore void. The resolution was as follows:—

> [fol. 79] "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

The resolution is rested upon the second paragraph of R. S. 18:14-8 as amended by ch. 191, P. L. 1941:—

> "18:14-8. Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon what is known as the "child-benefit" theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. That theory seems to have first been given judicial sanction in the State of Louisiana where the courts sustained a statute which permitted the use of public funds to purchase school books for distribution, free of cost, apparently as a loan, to "the school children of the state", a classification which by its broad terms included children in attendance at private and parochial schools. *Borden vs. Louisiana State Board of Education,* 168 La. 1005, 67 A. L. R. 1183, *Cochran vs. Louisiana State Board of Education,* 168 La. 1030. The latter case went to the United States Supreme Court (281 U. S. 370, 74 L. Ed. 913) where it was held that the legislation was not in violation of the 14th amendment to the United States constitution. Chief Justice Hughes, holding the opinion for the court (April 28, 1930), after quoting at length from the opinion of the Louisiana Supreme Court to the effect that the appropriations were "for [fol. 80] their (viz., the children's) benefit and the resulting benefit to the state", said (italics inserted):—

> "*Viewing the statute as having the effect thus attributed to it,* we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation *does not segregate private schools or their pupils,* as its beneficiaries * * *."

I am unable to find more in the federal decision than that, first, the Supreme Court accepted the finding of the state court upon the purpose and effect of the state statute and, second, that the statute, given the purpose and effect thus attributed to it, with the added incident that it did not segregate its beneficiaries, was not in violation of the 14th amendment. That the Supreme Court accepts the construction by a state court of a state statute in such a case is manifested by the fact that some years later it twice (317 U. S. 588, 63 Sup. Ct. 34, 87 Law. Ed. 481; 317 U. S. 707, 63 Sup. Ct. 153, 87 Law. Ed. 564) refused *certiorari* to re-

view the decision of the Oklahoma Supreme Court coming to an opposite conclusion regarding "child-benefit" in *Gurney vs. Ferguson, infra.*

The "child-benefit" theory seems to have received judicial support in only three jurisdictions, Louisiana (already discussed), Mississippi (*Chance vs. Mississipi State Textbook R. & P. Board,* 200 Southern 706), which followed the Louisiana reasoning in the construction of a statute of like import, and Maryland; and the last mentioned is the only jurisdiction, so far as appears, where the paying from public funds of transportation costs for children in private or sectarian schools has been judicially approved. In both Louisiana and Mississippi the subject matter was the free distribution of certain textbooks, and the provision was for the benefit of the children of the state, generally. In the State of Maryland it was held that a statute providing for transportation of children to private or parochial schools in the regular public school buses was constitutional, *Board of Education of Baltimore County vs. Wheat*—May 20, 1938—199 Atl. 628, and, several years later, that contributions from public money to the parochial schools for transportation in their own buses was likewise constitutional, *Adams vs. County Commissioners of St. Mary's County*—May 26, 1942—26 Atl. 2d 377. The trend from the one to the other of these two cases toward enlargement of the powers is to be observed.

[fol. 81] The "child-benefit" argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. Counsel for the appellants herein say of the theory that its

> "denomination, because of its generality, may be misleading, and we call it so here purely for identificatory purposes. It connotes so much more than merely the benefit to the child and has been so often and so authoritatively held so to do, that we deem it proper to mention the fact here, i.e., it connotes a huge and perhaps principal benefit to the State, in contributing to the advancement of education, the promotion of literacy, the health and safety of its citizens, that it

seems too narrow and insufficient to confine it in such a verbal straight jacket."

That observation made in support of the disbursements nevertheless emphasizes the almost limitless extent of the "child-benefit" theory. We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of knowledge, are the installation and maintenance of cafeterias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools toward "the advancement of education, the promotion of literacy and the health and safety" of the pupils. Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools.

On the contrary, the courts of at least six states have held that the private or parochial schools attended by the children are beneficiaries of such legislation and that the [fol. 82] legislation violates constitutional provisions which prohibit benefactions of that character. *State ex rel. Traub* vs. *Brown* (1934), 6 W. W. Harr. 32, 36 Del. 181, 172 Atl. 835 (writ of error dismissed 39 Del. 187, 197 Atl. 478); *Gurney* vs. *Ferguson* (1941), 190 Okla. 254, 122 Pac. 2d 1002; *Judd* vs. *Board of Education* (1938), 278 N. Y. 200, 15 N. E. 2d 576; *Mitchell* vs. *Consolidated School District* (Wash. 1943), 135 Pac. 2d 79; *Williams* vs. *Board of Trustees* (1917), 173 Ky. 708, 191 S. W. 507, L. R. A. 1917D 453; *Sherrard* vs. *Jefferson County Board of Education* (1943), 294 Ky. 469, 171 S. W. 2d 963; *Von Straten* vs. *Milquet* (1923), 180 Wisc. 109, 192 N. W. 392. The following

excerpts will indicate how positively those courts have expressed themselves:

From *Judd* vs. *Board* (New York Court of Appeals):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. * * * The courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools (citing cases) in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools."

From *State ex rel. Traub* vs. *Brown* (Delaware Superior Court):

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations. The relators cite in opposition to the above cases, the case of Borden vs. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A. L. R. 1183. We are not impressed by the reasoning of this case."

From *Gurney* vs. *Ferguson* (Oklahoma Supreme Court):

> "It is argued that the present legislative act (providing for transportation of pupils attending public schools) does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to

[fol. 83] a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child."

From *Mitchell* vs. *Consolidated School District* (State of Washington Supreme Court):

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question."

In *Sherrard* vs. *Jefferson County Board* the Kentucky Court of Appeals dealt with the question of transportation costs, rejected the "child-benefit" theory, approved the reasoning in *Gurney* vs. *Ferguson, supra,* and gave favorable citation of *State ex rel. Traub* vs. *Brown* and other decisions mentioned above. The A. L. R. annotator, by way of a resume of the law held in the cases reported and annotated in 63 A. L. R. 413, 118 A. L. R. 806 and 141 A. L. R. 1152, makes (Vol. 141, p. 1152) this well-supported observation:

"It seems to have been held, in most cases, that the transportation of pupils to a sectarian school amounts to the appropriation of moneys in aid of the school and is therefore unconstitutional."

It is the consensus of the weight of judicial opinion that the "child-benefit" theory is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose. I conclude that the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and is in violation of constitutional provisions which prohibit such aid or support. On the assumption that that is the correct answer to the posed question I proceed to consider our constitutional provisions:

Article 4, sec. 7, para. 6 of our state constitution provides:

"The fund for the support of free schools, and all money, stock and other property, which may hereafter

be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the [fol. 84] state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

There can be no doubt that the paragraph was violated if proceeds from the school fund were involved. The majority opinion takes the stand that the record before us is barren of any evidence as to the source of the funds from which the challenged payment was made, and so assumes that the disbursement was from other moneys. I suggest that while there is not specific proof that the payment contained any part of the school fund proceeds, nevertheless there is evidence from which an inference of such a fact may legitimately be drawn and that, such being the case, the thoroughly established jurisdiction of the Supreme Court to find facts, on *certiorari*, which are binding upon us should control here. There was not the slightest suggestion in the proofs that the disbursed money was specially raised, or that it came from a particular source, or that there had been a segregation of the proceeds of the school fund from the other school moneys in the hands of the township board. It is a fair inference, as I read the testimony, that the school moneys, from whatever source, were mingled and that the litigated disbursements were made from the mingled moneys. Counsel for respondents under the writ, appellants here, brought out by examination of the clerk of the board that the school law provided for payment of transportation costs and that the board, on February 15, 1943, directed the payment of "a transportation bill" for the first half of the school year—the second half-yearly payment was withheld because of this litigation—in the amount of

$8,034.95, and that included therein was the transportation of pupils to the Trenton High Schools, both junior and senior, and to the Trenton parochial schools. The machinery by which the proceeds of the state school fund and of the state school tax reaches the several school boards is as follows: The commissioner of education equitably apportions to the several counties the amount appropriated from the state school fund (R. S. 18: 10-17) and the state comptroller thereupon draws (italics inserted) "his *warrant* on the state treasurer in favor of the county treasurer of each county [fol. 85] for the portion of the income of the state school fund *and* of the state school tax to which the county is entitled" (R. S. 18: 10-27) and the respective county treasurer pays the same to the custodian of the school moneys in the several school districts on the orders of the superintendent of schools of the county (R. S. 18: 10-28); and the county superintendent is directed to apportion to the several school districts the state school moneys and the interest of the surplus revenue for various named purposes, among which is the meeting of seventy-five per centum of the cost of transportation of pupils (R. S. 18: 10-41). I consider that with this statutory mingling of moneys devoted to school purposes and with the proof that the local board directed the payment of "a transportation bill"—the mental picture is of a consolidated figure disposed of as one item—of $8,034.94 for a half year's transportation of both public school and parochial school pupils the Supreme Court had sufficient upon which to support a finding that the amount was paid from mingled moneys, of which the proceeds from the state school fund were a part. That finding is implicit in the Supreme Court decision. I accept it as supported by the record and therefore as binding upon us. It follows that the designated constitutional provision was violated. But the violation was not of that provision only.

Article 1, para. 19 provides:

> "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article 1, para. 20 provides:

> "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

Article 4, sec. 7, para. 11, provides:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Providing for the management and support of free public schools."

The conclusion, already reached, that the appropriation is in aid or support of the schools brings both the board resolution and the statute in conflict with para. 20. Our Supreme Court, our Chancery Court and our Court of Errors and [fol. 86] Appeals have either expressed or adopted a view that necessarily leads to that result. In *Rutgers Colleve vs. Morgan, Comptroller*, 70 N. J. L. 460, 474, Justice Van Syckel for the Supreme Court said of article 1, para. 20, and of the further provision relating to special laws: "They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; * * *." The opinion, with emendations that did not touch upon that expression, was adopted by the Court of Errors and Appeals, 71 N. J. L. 663. Justice Van Syckel's language was quoted verbatim by Vice Chancellor Buchanan in deciding *In re Voorhees*, 123 N. J. Eq. 142, with this observation (page 146): "This determination was quite clearly approved by the Court of Errors and Appeals in *Morris and Essex Railroad Co. v. Mayor, &c., of Newark*, 76 N. J. Law 555, 560, 70 Atl. Rep. 194." *In re Voorhees* was affirmed *sub nom. Union County Trust Co. vs. Martin* by the Supreme Court, 121 N. J. L. 594, on the opinion of Vice Chancellor Buchanan and was further affirmed by the Court of Errors and Appeals, 124 N. J. L. 35.

Further, even if acceptance is to be given to appellants' theory that the appropriations are for the benefit of the children, article 1, para. 19 is violated by the resolution under review because that resolution contains no provision for the transportation of children generally. The authorized payment becomes a gift of money in aid of individuals.

There is no provision for the transportation of children attending private or sectarian schools other than Catholic schools. Contrary to the statement of Chief Justice Hughes in *Cochran vs. Louisiana State Board, supra,* the resolution *does* segregate the schools and the pupils designated as beneficiaries. As has already been said, either the authority for this and every other provision of the resolution must be read into the statute or there is no authority for the resolution. Again, since the resolution is special as to those who are thus benefited by it and the arrangement is fitted into and integrated with the public school legislation, I consider that the constitutional prohibition against special legislation with respect to that system is violated, at least in spirit.

There is no compulsion upon parents in this state to send their children to a public school; but the public schools are [fol. 87] open to every child and are attended by children of all religious faiths. The suggestion that, notwithstanding constitutional restraint, transportation may be furnished, at public expense, to such private or sectarian schools in another municipality as a parent or guardian may select, even though there are public school facilities within the district, is not, I think, supported by the statute. It will be recalled that some of the children were transported to parochial elementary classes in Trenton although public schools of those grades were maintained in Ewing Township. The statute (R. S. 18:14-8) is not fairly susceptible of the construction that when a district board, owing to the lack of a local high school, arranges for the transportation of public school pupils to *high schools* in other centers, it may thereupon, likewise at public expense, transport children to the *elementary grades* of parochial schools located in those centers.

I hold district boards of education to be within the inhibitions placed by paragraphs 19 and 20, *supra,* upon municipalities and municipal corporations. *Cf. Landis vs. School District,* 57 N. J. L. 509, *State vs. Deshler,* 25 N. J. L. 177, *Strock vs. East Orange,* 77 N. J. L. 382, *Trustees vs. Civil Service Commission,* 83 N. J. L. 196, 202, aff. 86 N. J. L. 307.

Article 1, para. 3 of our state constitution provides:

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place

of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents. They operate at a loss. Inasmuch as the disbursements [fols. 88-89] from public moneys are, according to the view taken above, in aid or support of the schools thus maintained and operated, and there is no dispute over the proposition that tax moneys are a part thereof, I come to the further conclusion that the resolution is in violation of article 1, para. 3, *supra*.

Both the resolution of the board and the statute upon which the resolution is rested are before us for review. In my opinion both are in violation of our constitution and the resolution exceeds the statutory authority.

For the reasons stated I vote to affirm the judgment below.

Justice Colie and Judge Wells authorize me to say that they are in accord with the foregoing views.

[fols. 90-100] In New Jersey Court of Errors and Appeals

Arch R. Everson, Prosecutor-Respondent,

v.

Board of Education of the Township of Ewing, in the County of Mercer, et al., Respondents-Appellants

Rule for Reversal and Remittitur

This cause having been duly argued at the May Term, 1945, and briefs having been submitted, and the Court having examined the records and proceedings below, and

considered the grounds of appeal, and finding that there was error in the said record and proceedings of the Supreme Court:

It is therefore ordered that the judgment of the Supreme Court be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the Supreme Court to the end that the writ of certiorari be dismissed with costs to the appellants.

Entered this 8th day of November, 1945.

On Motion of William Abbotts, Attorney of Respondents-Appellants.

[fols. 101-102] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Denying Application for Reargument

Application for re-argument is denied.
Decision announced by Court on November 29, 1945.

[fol. 103] In New Jersey Court of Errors and Appeals

[Title omitted]

Petition for Allowance of Appeal From the New Jersey Court of Errors and Appeals to the Supreme Court of the United States—Filed February 5, 1946

To Honorable Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals:

The above-named prosecutor-respondent, feeling himself aggrieved by the judgment of the New Jersey Court of Erorrs and Appeals entered on the eighth day of November, 1945, in the above entitled cause reversing the judgment of the New Jersey Supreme Court dated September 14, 1944 in favor of the prosecutor-respondent and against the respondent-appellants, setting aside the resolution adopted by the Respondent-Appellant Board of Education on September 21, 1942, hereby prays your honor to allow an appeal from said judgment of the New Jersey Court of

Errors and Appeals, being the Court of last Resort in the State of New Jersey, to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be ordered to be sent to the said Supreme Court of the United States. That the case is one in which an appeal will lie is shown by the statement of jurisdiction filed herewith and attached hereto.

And prosecutor-respondent prays that said decision and judgment of November 8, 1945, be reversed and that a judgment be rendered in favor of the said prosecutor-respondent herein, appellant in the Supreme Court of the United States.

Dated: February 1, 1946.

Albert McCay, Attorney for and of Counsel with Prosecutor-Respondent.

[fol. 104] [File endorsement omitted.]

[fol. 105] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 5, 1946

Now comes the above named Appellant, Arch R. Everson, by Albert McCay, his counsel, and says that in the records and proceedings in the above entitled cause there is manifest error in this, to wit:

1. The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court setting aside the resolution of the Appellee Board of Education on the ground that said resolution authorizes an unconstitutional gift of public funds in aid of sectarian schools.

2. Said Court erred in refusing to sustain the holding of the New Jersey Supreme Court that Chapter 191, Laws of 1941 of the State of New Jersey, pursuant to which said resolution was adopted, is unconstitutional in that it authorizes the use of public funds for transportation of children to private and sectarian schools.

3. Said Court erred in refusing to hold that said resolution and statute violate the provisions of the 14th Amend-

ment to the Constitution of the United States in that they authorize aid to private and sectarian schools by taxation thus constituting a taking of private property for a private purpose.

4. Said Court erred in refusing to hold that said resolution and statute, even if not considered to be an aid to [fol. 106] private or sectarian schools but an aid only to the children attending such schools, violate the 14th Amendment to the Constitution of the United States in that it constitutes a taking of private property to aid private individuals.

5. Said Court erred in refusing to hold that said resolution and statute violate the 14th Amendment to the Constitution of the United States in that they are legislation respecting the establishment of religion.

6. Said Court erred in refusing to hold that said resolution and statute violate the 14th Amendment to the Constitution of the United States in that they constitute legislation authorizing the support of religious tenents by taxation.

7. Said Court erred in holding that Chapter 191, P. L. 1941 of New Jersey is a valid enactment and not in contravention of the 14th Amendment of the Constitution of the United States.

Albert McCay, Attorney for Appellant.

Challen B. Ellis, of Counsel.

[fol. 107] [File endorsement omitted.]

[fol. 108] In New Jersey Court of Errors and Appeals

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States—Filed February 5, 1946

The above-named prosecutor-respondent having petitioned the undersigned Presiding Judge of the New Jersey Court of Errors and Appeals for an order allowing said prosecutor-respondent to appeal to the Supreme Court of the United States from the judgment of the New Jersey

Court of Errors and Appeals, the Court of Last Resort of the State of New Jersey, dated November 8, 1945, and a bond, assignment of errors, citation and statement of jurisdiction having been duly presented:

It is, on this fifth day of February, 1946, Ordered that said appeal be and the same is hereby allowed, and appellant's bond in the sum of One Thousand Dollars ($1,000.00) with the Glens Falls Indemnity Company, surety thereon, is hereby approved as to form and sufficiency.

It is further ordered that the clerk of this court be and hereby is directed to prepare and certify a transcript of the record, proceedings, papers and judgment in this cause and transmit same to the Clerk of the United States Supreme Court within thirty days after the entry of this order.

Luther A. Campbell, Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals.

[fols. 109-114] [File endorsement omitted.]

[fols. 115-116] Citation in usual form, filed Feb. 5, 1946, omitted in printing.

[fols. 117-118] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

ORDER RECALLING REMITTITUR

A remittitur having been entered on November 8, 1945 remanding the record in this cause to the New Jersey Supreme Court, and an appeal from the judgment of the New Jersey Court of Errors and Appeals having been taken by the prosecutor-respondent to the Supreme Court of the United States.

It is on this 7th day of February, 1946, Ordered that said remittitur dated November 8, 1945, be and hereby is recalled for the purpose of enabling the clerk of this court to certify the record and proceedings in this cause to the clerk of the Supreme Court of the United States.

For the Court, Thomas J. Brogan, C. J. and Pro Tem Presiding Judge of the New Jersey Court of Errors and Appeals.

[fols. 119-120] ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged this 9th day of February, 1946, of a true copy of order dated February 7, 1946 recalling remittitur.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 121] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

PRAECIPE—Filed February 5, 1946

To Clerk of the New Jersey Court of Errors and Appeals, State House, Trenton, New Jersey.

SIR:

Take Notice that you are requested to include in the transcript in the above entitled cause to be filed with the United States Supreme Court, the following:

1. The State of Case filed in the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals.
3. The judgment of the New Jersey Court of Errors and Appeals.
4. Petition for re-argument and decision thereon.
5. Petition for allowance of appeal to the United States Supreme Court.
6. Order allowing appeal to the United States Supreme Court.
7. Appeal bond.
8. Statement of jurisdiction and points relied on.
9. Assignments of Error.
10. Praecipe.
11. Citation on appeal.
12. Proof of service of petition for allowance of appeal, order allowing appeal, statement of jurisdiction and points [fol. 122] relied on, assignments of error and citation.
13. Certificate of return of clerk of the New Jersey Court of Errors and Appeals.

Respectfully yours, Albert McCay, Attorney for and of Counsel With Prosecutor-Respondent.

ACKNOWLEDGMENT OF SERVICE

Service of copy of the annexed Praecipe in the above entitled cause is hereby acknowledged this 5th day of February, 1946.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 123] [File endorsement omitted.]

[fol. 124] IN NEW JERSEY COURT OF ERRORS AND APPEALS

[Title omitted]

AMENDED PRAECIPE

To: Clerk of the New Jersey Court of Errors and Appeals, State House, Trenton, New Jersey.

SIR:

Take Notice that you are requested to include in the transcript in the above entitled cause to be filed with the United States Supreme Court, the following:

1. The State of Case filed in the New Jersey Court of Errors and Appeals.
2. The opinion of the New Jersey Court of Errors and Appeals.
3. The dissenting opinion filed in the New Jersey Court of Errors and Appeals.
4. The judgment of the New Jersey Court of Errors and Appeals, namely Rule For Reversal and Remittitur entered on November 8, 1945.
5. Petition for leave for re-argument.
6. Decision on application for leave for re-argument.
7. Petition for allowance of appeal to the United States Supreme Court.
8. Order allowing appeal to the United States Supreme Court.

[fols. 125-126] 9. Appeal bond.

10. Statement of jurisdiction and points relied on.
11. Assignments of Error.
12. Citation on appeal.
13. Acknowledgment of service of petition for allowance of appeal, order allowing appeal, statement of jurisdiction and points relied on, assignments of error and citation.

14. Order Recalling Remittitur.
15. Acknowledgment of Service of Order Recalling Remittitur.
16. Praecipe, with acknowledgment of service endorsed thereon.
17. Amended Praecipe, with acknowledgment of service endorsed thereon.
18. Certificate of return of clerk of the New Jersey Court of Errors and Appeals.

Respectfully yours, Albert McCay, Attorney for and of Counsel with Prosecutor-Respondent.

ACKNOWLEDGMENT OF SERVICE

Service of copy of the annexed Amended Praecipe in the above entitled cause is hereby acknowledged this 11th day of February, 1946.

William Abbotts, Attorney for Respondents-Appellants.

[fol. 127] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 128] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 14, 1946

Appellant in the above entitled cause, by his counsel, states that he expects to rely upon each and all the assignments of error attached to the record filed herein and adopts the said assignments of error as his statement of the points upon which he intends to rely.

DESIGNATION OF RECORD TO BE PRINTED

The entire record except the Application for Leave for Reargument in the New Jersey Court of Errors and Appeals and the Appeal Bond.

Edward R. Burke, Challen B. Ellis, 504 Southern Building, Washington, D. C., Counsel for Appellant.

Service of the above statement is acknowledged March 13, 1946.

William H. Speer, Counsel for Appellees.

[fol. 129] [File endorsement omitted.]

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 6, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[Endorsed on Cover:] File No. 50,614, New Jersey, Court of Errors and Appeals. Term No. 52. Arch R. Everson, Appellant, vs. Board of Education of the Township of Ewing, in the County of Mercer, et al. Filed March 4, 1946. Term No. 52 O. T. 1946.